The authorities relied upon by the court are of little weight—the Tennessee case, because the decision was accompanied by no opinion, and the United States case, because the situation there was different, as the cabs in question did not occupy public stands on the streets, but were obtained from the garage by order only.

A question somewhat similar to that of the New York case arose in a recent case in Pennsylvania.[12] Here the plaintiff, who was injured while riding in a taxicab was permitted to recover double indemnity under a policy, which stipulated that such indemnity should be paid when the injury occurred in "a public conveyance, provided for passenger service and propelled by steam, gasoline, *etc.*" This statute differs from the one in the New York case in not specifying that the "public conveyance" is to be provided by a "common carrier." This difference, however, is more apparent than real, for it would seem to follow on principle that a company operating a public conveyance was in that connection a common carrier. Although it is not clear from the opinion whether the court considered that the plaintiff and his party had the right to occupy the taxicab exclusively,[13] their reasoning appears to be broad enough to cover the facts of the New York case, and they probably would have decided that the defendant company in that case was a common carrier.

Both on principle and by analogy to hack and transfer companies, taxicab companies occupying public stands on the streets or otherwise holding themselves out to serve the public should be held to be common carriers for all purposes.

Edwin R. Keedy.

TORTS—CONTRIBUTORY NEGLIGENCE—"LAST CLEAR CHANCE"—In practically every common law jurisdiction it is held as a general proposition of law that the contributory negligence of the plaintiff destroys his right to recover from an equally negligent defendant, or at least operates to reduce the damages which should be awarded to him, but in practically every common law jurisdiction it is equally true that the plaintiff by his pure negligence, exposing himself to the risk of the injury, does not forfeit under all circumstances his right to damages for the injuries caused him by another. It is uni-

[12] Primrose v. Casualty Co. of America, 232 Pa. 210 (1911).

[13] Two statements of the court on this point are apparently conflicting: (1) "Those who rode in them . . . were as much passengers in them as they would have been if riding in a specially chartered car of a railroad company from which all but themselves were excluded." (2) "The use of no one of its machines was limited to any particular person, but anyone able to pay the price for riding in it, while it was under the control of and being operated by one of the company's employees, could do so."

versal law that a person who deliberately takes advantage of an opportunity which another has negligently afforded him to inflict injury upon such other is liable to compensate him for the harm which he intentionally inflicts.[1]

In many jurisdictions contributory negligence is no bar to the recovery of damages caused by the wanton misconduct of another.[2] In so far as the conduct is really wanton, in so far as it is characterized by conscious indifference to the obvious risk which it creates, this is nothing more than a recognition that mere inadvertence does not excuse conscious or deliberate wrongdoing. In the great majority of American jurisdictions as well as in England, it has for years been accepted law that a defendant, who after discovering a plaintiff in a position of helpless peril into which his own negligence has put him, continues to act without taking such precautions as are then possible and so brings injury upon the plaintiff, is "solely" responsible for the ensuing harm.[3]

Many of the jurisdictions which profess to allow recovery to a negligent plaintiff only where the defendant's act is wanton or wilful, reached substantially this same result by branding as wanton a failure to take ordinary precautions to avert the accident when the plaintiff's helpless peril is discovered.[4]

A number of American jurisdictions have held that, where the relation between the plaintiff and defendant is such that the defendant owes a duty to the plaintiff to be on the lookout to discover whether the plaintiff is or is not in a position of danger, the defendant is as fully responsible if he could and should have discovered the plaintiff's helpless, though negligent, peril, in time to avert the accident as when he knew of it.[5] It is impossible in the short space of a note to discuss the causes which have led to these views.

It may be said, however, that the thought underlying them is that the defendant, who could, but did not, avert the catastrophe after he did or should have known of its imminence, is to be regarded as the ultimate final or decisive cause of the accident. It follows from this view that in the crisis the plaintiff must not be able

[1] Steinmetz v. Kelly, 72 Ind. 442 (1880); Birmingham, etc., Co. v. Jones, 146 Ala. 277 (1906); Wynn v. Allard, 3 W. & S. 524 (Pa. 1843).

[2] Banks v. Braman, 188 Mass. 367 (1904); Alger, Smith & Co. v. Duluth Superior Trac. Co., 93 Minn. 314 (1904); Md. B. & W. R. R. v. McBrown, 46 Md. 229 (1874).

[3] Iowa Cent. R. R. v. Walker, 203 Fed. 685 (1913); see cases cited in note to that case, Bohlen's Cases on Torts, p. 1387.

[4] Parsons, J., in Cavanaugh v. B. & M. R. R., 76 N. H. 68 (1911); Smith v. N. & S. R. R., 114 N. C. 728 (1894); Cole v. Metro. St. Ry., 121 Mo. App. 605 (1906); Rawitzer v. St. Paul City Ry., 90 Minn. 84 (1904); and see Ga. R. Co. v. Lee, 92 Ala. 262 (1890).

[5] Teakle v. San Pedro, etc., R. R., 32 Utah 276 (1907); and cases cited in the notes to that case in Bohlen's Cases on Torts, pp. 1387-1390.

to control the situation, and that the defendant shall have the power to do so. Therefore, the majority of jurisdictions hold that where the plaintiff had the physical ability, if he had been upon the alert, to avoid the accident, he cannot recover against a defendant who had a similar physical ability, but who also through inadvertence did not realize the necessity of using it.[6]

So a plaintiff, who without taking any pains to observe whether a car is approaching upon a level crossing, walks upon it, is not allowed to recover from a defendant railway, whose engineer or motorman is guilty of a like inadvertent failure to observe his danger.[7]

There are, however, some jurisdictions which seem to believe that defendants owe plaintiffs a higher degree of vigilance than the paintiffs owe to themstlves, and hold that a plaintiff who is in full possession of his faculties, but who in a moment of carelessness walks, without looking, directly into the path of an oncoming car or train may recover, though the only fault alleged against the driver of the car or train is his failure to observe that the plaintiff is drifting into peril.[8]

In the great majority, if not all of these cases, however, there are two features: 1st, the ensuing collision harms only the plaintiff; thus, creating that sympathy which the primitive law showed to the injured man—a sympathy which still subsists in many juries, and, as these cases show, in some courts; 2nd, the defendant is a corporation carrying on a business, which, though necessary to the public, is primarily conducted for the profit of the corporation and its stockholders, and the accident happens upon a public highway or other place upon which private travelers had originally an exclusive right, but over which these corporations are permitted, because of their public utility to carry on, in derogation of the originally exclusive right of the ordinary public, a business which, unless conducted with the utmost care is bound to create a considerable risk to their use of the highway. It may well be that this situation has led the court to instinctively feel that a company exercising peculiar rights over a previously public way and conducting thereon a business dangerous in the highest degree, unless conducted with the most scrupulous care, should be held to the highest standard of diligence and vigilance. While there is this diversity of opinion above noted, there is a substantial unanimity in holding that the plaintiff by his negligence must have put himself in a posi-

[6] French v. Grand Trunk R. R., 76 Vt. 441 (1904); and cases cited in notes to that case in Bohlen's Cases on Torts, pp. 1390-1392.

[7] French v. G. T. R., *supra*.

[8] Birmingham L. & P. Co. v. Brantley, 141 Ala. 614 (1904); Cons. R. Co., v. Rifcowitz, 89 Md. 338 (1899); Murphy v. Wabash, 228 Mo. 56 (1910); Hutchinson v. St. Louis, etc., R. R., 88 Mo. App. 376 (1901); Lassiter v. Raleigh, etc., R. R., 133 N. C. 244 (1913); Memphis St. Ry. Co. v. Haymns, 112 Tenn. 712 (1904).

tion in which he is physically helpless, or he must by such obvious inattention or absent-mindedness indicate that he cannot be expected to control the event, and that the defendant must, at the time when he did or could have observed the plaintiff's peril, have had the ability to avert the accident. So the overwhelming weight of authority in America is to the effect that a precedent act of negligence, whether of commission or omission, whereby the defendant has put it out of his power to avert the accident after discovering that it is impending, does not make him responsible to a plaintiff who has, through his negligence, exposed himself to the peril, and, this is so though the plaintiff's negligence consists not merely of an inadvertence or absent-mindedness which precludes him from exercising his power of self-protection, but is some more or less deliberate act which placed him in a helpless position in the path of the danger.[9]

In a recent case, *British Columbia Rwy. Co.* v. *Loach*,[10] the British Privy Council decided that a defendant is the sole responsible cause of an accident, if a precedent act of negligence, which itself occurred long before the plaintiff's negligence, has made unavailing the obviously proper precautions which the defendant's agent took to avert the accident when he was first able to perceive that it was imminent. In that case a man named Sands, the plaintiff's decedent, who was driving with a friend, was run down and killed at a level crossing by a car of the railway company. Neither he nor his friend appeared to have seen the car until they were so close to the crossing that they could not stop in time to prevent the collision. There were no circumstances which could have excused their failure to see the car. Their view was unobstructed and there was plenty of light. Thus, they were unquestionably guilty of contributory negligence in driving upon the crossing in the face of a peril, which the least use of their senses would have shown them. The driver of the car appears to have seen the wagon approaching the crossing while the car was still so far from it that, had the brakes been in good order, he could have stopped it in time to prevent the collision. He attempted to do so, but the brakes being out of order the car did not stop and the collision occurred. It also appeared that the car was running at an excessive speed.

Lord Sumner, who delivered the opinion of the Privy Council, said in answer to the argument that if the defendant's negligence continued up to the moment of the collision, so did the deceased's contributory negligence, "The consequences of deceased's contributory negligence continued, it is true, but, after he had looked, there was no more negligence, for there was nothing to be done and his contributory negligence will not disentitle him to re-

[9] Trow v. Vermont Central R. R., 24 Vt. 487, and cases cited in the notes to that case in Bohlen's Cases on Torts, p. 1394, 1397.

[10] 1 A. C. Reports (1916) 719.

cover if the defendant might by the exercise of care on his part have avoided the consequences of the neglect or carelessness of the plaintiff."

He adopts the opinion of Anglin, J., in *Brenner* v. *Toronto Railway Co.*,[11] to the effect that "where a situation of imminent peril has been created, either by the joint negligence of both plaintiff or defendant, or it may be by that of the plaintiff alone, in which, after the danger is or should be apparent, there is a period of time of some perceptible duration during which both or either may endeavor to avert the impending catastrophe, and notwithstanding the difficulties of the situation, efforts to avoid injury duly made would have been successful, but for some self-created incapacity which rendered such efforts inefficacious, the negligence which produced such a state of inability is not merely the part of the inducing causes —it is, in very truth, the efficient, the approximate, the decisive cause of the incapacity, and therefore of the mischief. Negligence of a defendant incapacitating him from taking due care to avoid the consequences of the plaintiff's negligence, may, in some cases, though anterior in point of time to the plaintiff's negligence, constitute 'ultimate' negligence, rendering the defendant liable notwithstanding a finding of contributory negligence of the plaintiff."

Those jurisdictions which have taken the so-called humanitarian view and allowed recovery where both the plaintiff and defendant are equally able to avert the accident, and are equally guilty of inadvertence continuing until the opportunity to control the event is over, might very properly take the same final step. They have already substantially repudiated the theory that recovery is permitted only where the defendant's negligence is subsequent to that of the plaintiff. Having imposed upon the defendants a superior duty of vigilance, they may well go further and insist that they maintain their equipment in such condition as to make such vigilance effective. Otherwise, as Lord Sumner said in *British Columbia Railway Co.* v. *Loach*,[12] "the defendant company would be in a better position where they had supplied a bad brake but a good motorman, than where the motorman was careless but the brake efficient."

Francis H. Bohlen.

TORTS—TRESPASS—ACTION FOR THE DEATH OF A HUMAN BEING—A recent case in England [1] has again brought up that apparent anomaly in the common law that there may be no civil action for the death of a human being, though there may be for an

[11] 13 Ontario Law Reports 423.

[12] Note 9, *supra*.

[1] Admiralty v. S. S. Amerika, 1917 A. C. 38 (Eng.).